

**Little Rapids Corporation, Potsdam Paper Mills Division and Larry Marcellus and Lee S. Selleck and Leland M. Drake.** Cases 3-CA-16810, 3-CA-16853, and 3-CA-16946

March 5, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case<sup>1</sup> present the issue of whether the Respondent unlawfully refused to reinstate employees who had participated in an economic strike.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Little Rapids Corporation, Potsdam Paper Mills Division, Potsdam, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> On September 2, 1992, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In its exceptions the Respondent contends that the poststrike jobs for which the discriminatees applied were not substantially equivalent to their prestrike jobs and that the discriminatees were not qualified to perform these jobs. We disagree. Although the Respondent during the strike introduced some new equipment and methods of quality control which involved employee training, these changes were not substantial and the training, which was provided on the job, was not extensive. Under these circumstances, we agree with the judge that the jobs for which the discriminatees applied were substantially equivalent to their prestrike jobs and that the Respondent is obligated to recall the discriminatees to these jobs. As the Board has held, "employer misgivings concerning the qualifications of an economic striker are to be tested on the job through recall, with the employer, later, permitted to take appropriate action if the recalled striker is in fact 'qualified or cannot do the work.'" *Lehigh Metal Fabricators*, 267 NLRB 568, 575 (1983); *Brooks Research & Mfg.*, 202 NLRB 634, 637 fn. 13 (1973). See also *Oregon Steel Mills*, 291 NLRB 185, 195-196 (1988).

Robert A. Ellison, Esq., for the General Counsel.

Paul V. Lucke, Esq. (Reinhart, Boerner, Van Deuren, Norris & Rieselbach), of Milwaukee, Wisconsin, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Potsdam, New York, on May 27 and 28, 1992. On charges filed on January 13 and 30 and March 9, 1992, a complaint was issued on April 9, 1992, alleging that Little Rapids Corporation, Potsdam Paper Mills Division (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by failing and refusing to reinstate several former economic strikers. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given a full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case,<sup>1</sup> including my observation of the demeanor of the witnesses, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a Wisconsin corporation with its principal office and place of business in Green Bay, Wisconsin, operates a papermill in Potsdam, New York, which has been engaged in the manufacture and nonretail sale of paper. Respondent annually ships and sells good valued in excess of \$50,000 from the Potsdam facility directly to points located outside the State of New York. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. The Facts**

**1. Background**

The production and maintenance employees represented by United Paperworkers International Union Local No. 1726, AFL-CIO engaged in an economic strike at the Potsdam facility which lasted from April 1, 1989, to May 25, 1990. Permanent replacements were hired during the strike with the mill eventually being fully staffed by permanent replacements and several strikers who crossed the picket lines. On March 1, 1990, Leland M. Drake filed a decertification petition, and the Union was officially decertified in late May 1990. A preferential rehire list was established by Respondent which contained names of former strikers seeking reinstatement. Drake, Larry Marcellus, and Lee S. Selleck were among those former strikers who signed the preferential list in June 1990.

**2. Leland Drake**

Drake began his employment in 1966. He participated in the strike which ended on May 25, 1990. His prestrike posi-

<sup>1</sup> The General Counsel's motion to correct transcript is granted.

tion was No. 3 paper machine tender. Prior to the strike, the lowest ranking position on the paper machine was that of broke hustler. The next position was fourth hand and the next highest position was winder operator. The second to the highest position was back tender and the highest position was machine tender. Two to three weeks after the strike ended, Drake offered to return to work. Originally, former strikers applied for openings by coming to the plant and signing the posting, but they were subsequently informed by Jackie Lyons, the personnel assistant, that they could telephone in their interest for any particular opening. Thereafter, either Drake or his wife telephoned in his interest in specific openings.

On October 18, 1991,<sup>2</sup> Drake was mailed a notice for a No. 3 machine tender vacancy. The accompanying letter stated, "[I]f you are interested and feel you are qualified, please respond to Jackie Lyons at our Human Resources Department by October 25, 1991." Drake credibly testified that on October 24, in response to the job offer, he telephoned the plant. He testified as follows:

I asked for Jackie but she wasn't there. . . . Whoever I talked to on the phone said she was out for the mail or [I] think that's what she said, and she would leave a message. I told her who I was.

Q. What was the message you left?

A. I'd like to apply for the number three machine tender.

Q. What did the person you spoke to say?

A. That she would just give the message to Jackie.

Larry Marcellus testified that he overheard Drake's conversation and heard Drake say that he was interested in applying for the No. 3 paper machine operator job. Debbie Marcellus credibly testified that she also overheard the conversation and she heard Drake ask for Jackie Lyons. Jackie Lyons, who appeared to me to be a credible witness, testified that she did not recall Drake calling her and asking to be considered for the position. Similarly, Andrea Harbart, the plant's receptionist and switchboard operator, also testified that she did not recall Drake calling her on October 24 expressing an interest in a job opening. Drake never received notification from Respondent with respect to that position. His name was not taken off the preferential rehire list and he has continued to receive mailings of job openings. The No. 3 machine tender position was awarded to Randy Clifford, who was a permanent strike replacement and had been classified as a No. 3 back tender.

I have credited both Drake's testimony and Lyons' testimony. I find that on October 24 Drake telephoned Respondent and asked for Lyons. Lyons was not available and Drake told the person who answered the phone that he would like to apply for the No. 3 machine tender vacancy. The person who answered the phone said that she would give the message to Lyons. Lyons apparently never received the message and consequently Drake's name was not placed on the list of those interested in the position. The position was awarded to Clifford, a permanent strike replacement.

<sup>2</sup> All dates refer to 1991 unless otherwise specified.

### 3. Larry Marcellus

Marcellus began his employment with Respondent in July 1981. He was also one of the employees who participated in the strike which ended in May 1990. At the time of the strike he had been a winder operator on the No. 3 machine for 3-1/2 years. Prior to that he had been the No. 2 machine winder operator, and he had also often filled in the back tender position. He had never been informed by Respondent that he was considered inadequate in the performance of his duties in any respect. About a week after the strike ended Marcellus submitted his resume and thereafter he began receiving notices of vacancies. Although the postings generally required that the successful applicant take the "HRI" and "ABLE" tests, Marcellus was never called in to take the tests. Norman Tomlinson, Respondent's production manager, explained that "HRI" or "Human Resources Inventory" is a standardized test which determines how well people can work together in a teamwork type atmosphere. The "ABLE" test, "Adult Basic Learning Evaluation," is another standardized test which evaluates basic adult knowledge and the ability for adults to learn and to communicate with each other. He testified that only applicants who were determined to be finalists were given the HRI and ABLE tests.

Marcellus received a November 12, 1991 posting of a vacancy for his prestrike job, namely, winder operator. He called Lyons and expressed his interest in the position. The job description for the winder operator position did not differ from Marcellus' actual prestrike duties and he met the enumerated prerequisites and qualifications with the exceptions of the HRI and ABLE tests which, as noted, he was never afforded an opportunity to take. Marcellus was not offered the position. Instead, the position was awarded to Mike Jacob, a permanent strike replacement who had previously been classified as a fourth hand.

Marcellus received another posting for a No. 3 winder operator position dated December 11, and he again applied. This was the same position that he previously applied for in November. He was also not awarded this position. Instead, the job was awarded to Tom Losey, a former striker who had been reinstated as a utility worker.

### 4. Lee Selleck

Selleck began his employment with Respondent in August 1984 and was also one of the employees who had been engaged in the strike which ended in May 1990. At the time of the strike he had been employed as a fourth hand on the No. 3 machine for about 1-1/2 years. Prior to that time he had been a broke hustler on the No. 3 machine. Selleck applied for a No. 3 fourth hand vacancy announced on December 11, 1991, but received no reply. The job description in the posting was the same as his actual prestrike duties. Selleck credibly testified that he met all the listed prerequisites with the exception of the HRI and ABLE tests which he was not asked to take. The position was awarded to Phil Vivlamore, a permanent strike replacement. Selleck was subsequently reinstated in April 1992 as a mill utility worker. Since his reinstatement he has performed a variety of duties, including three occasions when he performed the No. 3 machine fourth hand duties. The job was no different than it had been prior to the strike and Selleck was able to perform all the duties. Although Selleck has not been as-

signed to perform the winder operator duties since his reinstatement, he observed no changes in the content of the job.

#### Discussion and Conclusions

##### 1. Applicable legal principles

In *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enf.d. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), the Board held:

[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Such individuals are entitled to return not only to their former jobs, but also to substantially equivalent jobs, when they become vacant. *Rose Printing Co.*, 304 NLRB 1076 (1991). The Board has also held that an employer is generally obligated to offer the initial job vacancy created by the departure of a strike replacement to an unreinstated “qualified” striker. *Nolan Systems*, 268 NLRB 1248, 1250 (1984).

##### 2. Drake

Respondent argues that Drake failed to apply for the No. 3 machine tender position which was posted on October 18, 1991. I have credited Drake’s testimony that on October 24 he called the plant and asked for Jackie Lyons. When he was told by the person who answered the telephone that Lyons was not available he said that he would like to apply for the No. 3 tender position and the person who answered the telephone said that she would give Lyons the message. Although I credit Lyons’ testimony that she did not receive the message, and consequently, she did not place Drake’s name on the list of those interested in the position, it is well settled that the employer’s burden of notification cannot be shifted to the former striker. *U.S. Mineral Products Co.*, 276 NLRB 140, 142 (1985). In *American Olean Tile Co.*, 265 NLRB 1625, 1628 (1982), enf. denied on other grounds 826 F.2d 1496 (6th Cir. 1987), the credited testimony of the union representatives that an offer to return on behalf of all strikers was made by telephone to the plant manager constituted an effective offer notwithstanding the likewise credited testimony of the plant manager that he did not recall receiving the telephone call.

When Drake’s former position became vacant on the permanent disability of striker replacement, Collier, Drake was automatically entitled to reinstatement. Although Respondent argues in its brief that Clifford was more qualified than Drake for the position, finding someone who is “more qualified” is not a legally sufficient justification for not awarding the position to the former striker. As the Board stated in *Nolan Systems*, supra, 268 NLRB at 1250, the employer is obligated to offer the job vacancy to an unreinstated “qualified” striker. Drake’s prestrike position was No. 3 machine tender. The job description for the No. 3 tender position did not differ from Drake’s prestrike job in terms of duties,

prerequisites, or qualifications except with reference to the HRI and ABLE tests. Drake was not given the opportunity to take these tests, because, as Tomlinson testified, the tests were only administered to the “finalists.” I, therefore, find that by not offering Drake the machine tender position which was posted on October 18 and was awarded to Clifford on November 4, Respondent violated Section 8(a)(1) and (3) of the Act.

##### 3. Marcellus

Prior to the strike, Marcellus had been a winder operator on the No. 3 machine. He applied for the November 12 winder operator posting. The job description for the winder operator position did not differ from Marcellus’ actual prestrike duties and he met the enumerated prerequisites and qualifications with the exception of the HRI and ABLE tests which he had not been afforded the opportunity to take. On November 26 the position was awarded to Mike Jacob, a permanent replacement. In addition, Marcellus applied for the same position which was posted on December 11. That position was awarded to Tom Losey, who had been a former striker and had been reinstated as a mill utility worker. Respondent takes the position that both Jacob and Losey were better qualified for the position than was Marcellus. As pointed out above, however, the fact that an employer may find someone who is more qualified does not absolve the employer from the obligation to offer the initial job vacancy created by the departure of a strike replacement to an unreinstated “qualified” striker. *Nolan Systems*, supra, 268 NLRB at 1250. The record demonstrates that Marcellus was qualified to perform the duties of machine winder operator.

In *Aluminum Welding Works*, 282 NLRB 396 (1986), an employer refused to reinstate an economic striker on a preferential hiring list and asserted that the applicant it hired was a “faster” worker. The Board upheld the judge’s decision, which stated (id. at 397) “an economic striker’s reinstatement rights are not dependent on an employer’s ability to find a faster, or otherwise ‘better,’ worker after an unconditional offer to return [to] work is made.” The decision noted that when work for which the former striker was “qualified” became available, his “right to reinstatement matured” and that right could only be defeated by the employer’s showing of a legitimate and substantial business justification for not reinstating him. The only “business consideration” was the employer’s hope of employing someone “faster” than the former striker. The decision continued (id.):

[S]uch hope has never been held to be a “legitimate and substantial” business consideration as envisioned by the Court. Nor could it be. It is not “substantial” because all employers, at all times, hope to find faster or otherwise “better” workers. It is not “legitimate” because it would allow employers to pick and choose among returning strikers on the basis [of] its evaluation of its prospects of fulfilling this universal hope of finding “better” employees. Therefore, Respondent’s refusal to reinstate Plamowski when work for which he was qualified became available, even if Doherty was better qualified, was a violation of Plamowski’s right to reinstate[ment] . . . .

I find, therefore, that by failing to award the winder operator position posted on November 12 to Marcellus, and instead, awarding the position to Jacob, a permanent strike replacement, Respondent violated Section 8(a)(1) and (3) of the Act.<sup>3</sup>

#### 4. Selleck

Prior to the strike Selleck had been employed as a fourth hand on the No. 3 machine.<sup>4</sup> He applied for a No. 3 fourth hand vacancy announced on December 11. The job description in the posting was the same as his actual prestrike duties. I find that he met all the listed prerequisites with the exception of the HRI and ABLE tests which he was not asked to take. On January 20, 1992, the position was awarded to Vivlamore, a permanent replacement. In April 1992, Selleck was reinstated as a mill utility worker. Since his reinstatement he has performed a variety of duties including several occasions when he performed the No. 3 machine fourth hand duties. I credit Selleck's testimony that the job was no different than it had been prior to the strike and that Selleck was able to perform all the duties. Although Respondent maintains that Vivlamore was more qualified for the position than Selleck, I have found that Selleck performed fourth hand duties prior to the strike and he was qualified for that position. Accordingly, when that position became available, his right to reinstatement matured. I find that Respondent has not shown a "legitimate and substantial business justification" for not reinstating him. By failing to award the position to Selleck and by instead, awarding the position to Vivlamore, a permanent replacement, Respondent violated Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Little Rapids Corporation, Potsdam Paper Mills Division is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing and refusing to reinstate Leland M. Drake, Larry Marcellus, and Lee S. Selleck to their former, or substantially equivalent, positions of employment, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>3</sup> The General Counsel's brief notes that Marcellus also applied for the November 12 vacancies in the back tender and mill utility positions and the December 11 winder operator and fourth hand positions. Inasmuch as I have found that Respondent was required to award the November 12 winder operator vacancy to Marcellus, I believe that I need not decide whether Respondent's failure to award the additional positions constituted violations of the Act. In this connection, I note, however, that Marcellus' prestrike position was that of winder operator. See *Rose Printing Co.*, supra, 304 NLRB at 1076.

<sup>4</sup> Tomlinson testified that prior to the strike Selleck had been classified as a broke hustler but had been temporarily filling in as a fourth hand. Tomlinson acknowledged, however, that as of March 1989 Selleck was earning more than the broke hustler rate. On rebuttal, Selleck testified that he had officially been awarded the fourth hand position. I credit Selleck's testimony.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order that Respondent offer full and immediate reinstatement to Leland M. Drake in the position of machine tender; to Larry Marcellus in the position of winder operator; and to Lee Selleck in the position of fourth hand. I shall further order that Respondent make the three individuals whole for any loss of earnings that they may have suffered from the dates of the initial postings to the dates of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Little Rapids Corporation, Potsdam Paper Mills Division, Potsdam, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers to their former, or substantially equivalent, positions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Leland M. Drake immediate and full reinstatement to the position of machine tender; offer Larry Marcellus immediate and full reinstatement to the position of winder operator; and offer Lee S. Selleck immediate and full reinstatement to the position of fourth hand; or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, with interest, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Potsdam, New York, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice

<sup>5</sup> Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing in which all parties were afforded the opportunity to present evidence it has been found that we violated

the National Labor Relations Act in certain respects and we have been ordered to post this notice.

WE WILL NOT refuse to reinstate economic strikers to their former, or substantially equivalent, positions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Leland M. Drake immediate and full reinstatement to the position of machine tender; offer Larry Marcellus immediate and full reinstatement to the position of winder operator; and offer Lee S. Selleck immediate and full reinstatement to the position of fourth hand; or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and WE WILL make them whole for any loss of earnings, with interest.

LITTLE RAPIDS CORPORATION, POTSDAM  
PAPER MILLS DIVISION